

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>SALOME KASPER</b>	)	
Claimant	)	
VS.	)	
	)	
<b>MCDONALD'S</b>	)	Docket No. 1,067,442
Respondent	)	
AND	)	
	)	
<b>KANSAS RESTAURANT &amp; HOSPITALITY ASSOC.</b>	)	
<b>SELF INSURERS FUND</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant requests review of the April 2, 2014, preliminary hearing Order entered by Administrative Law Judge (ALJ) Rebecca Sanders.

**APPEARANCES**

Roger D. Fincher, of Topeka, Kansas, appeared for the claimant. Douglas A. Dorothy, of Overland Park, Kansas, appeared for respondent and its insurance carrier.

**RECORD AND STIPULATIONS**

The Board has adopted the same stipulations and considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing from April 2, 2014, with exhibits attached and the documents of record filed with the Division.

**ISSUES**

The ALJ found claimant failed to sustain her burden of proof of personal injury and denied her preliminary hearing requests. Unauthorized medical expenses of \$500 were ordered reimbursed to claimant's counsel.

The claimant requests review of the following:

- “1. Whether or not claimant suffered a compensable personal injury by accident in the course of her employment that arose out of her employment;
2. Whether the prevailing factor for claimant’s need for medical treatment was her October 11, 2013, fall; and
3. Whether claimant is entitled to medical treatment with Dr. Sushmita Veloor.”<sup>1</sup>

Claimant argues there is no evidence in the record suggesting her condition existed prior to October 11, 2013, or that she ever had any treatment for any similar problems prior to October 11, 2013. Claimant requests the ALJ’s Order be reversed and she be allowed to see Dr. Veelor for authorized medical treatment of her right upper extremity.

Respondent argues the Board does not have jurisdiction to consider the issues stated in the application for review and claimant’s brief. Respondent contends the ALJ made no specific findings regarding claimant’s work-related accident, and denied medical benefits based up review of the medical evidence. Therefore, review of this matter is improper on appeal due to a lack of jurisdiction. Irrespective of jurisdiction, respondent argues the Order should be affirmed.

#### **FINDINGS OF FACT**

The purpose of the preliminary hearing was to address claimant’s request for medical treatment for the right elbow as recommended by Daniel D. Zimmerman, M.D., although with Dr. Veloor, and to request payment of medical bills and payment of \$500 in unauthorized medical to cover Dr. Zimmerman's report.

In October 2013, claimant was seven months pregnant and working as a crew member for respondent. As claimant was leaving work on October 11, 2013, she slipped and fell on a wet floor, landing on her right side, while leaving the building at the end of her shift. A manager helped claimant to the car she was riding in. Claimant told her ride that she fell and needed to go to the hospital. Claimant was taken home so that she could call and report the accident and then she was taken to the hospital.

At the hospital, claimant reported pain in her right arm, hip and neck. She was checked out as much as could be done because of her pregnancy. She was taken off work until October 17, 2013, and instructed to rest in bed and to get up only for meals and the bathroom. She was instructed to use ice and heat for her sore muscles. On October 13, 2013, claimant was allowed to resume activity as tolerated, her pain medication was refilled and she was instructed to keep her October 16, 2013, appointment.

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<sup>1</sup> Application for review (filed Apr. 8, 2014).

On October 30, 2013, claimant met with Dr. Zimmerman at her attorney's request. Claimant reported injuring her cervical spine, right arm and right hip in the accident. Her chief complaint was recorded as pain in the right elbow. She doesn't know why Dr. Zimmerman only recorded the right elbow pain as she claims to have reported arm and neck pain also. Dr. Zimmerman did not record that claimant reported pain in her cervical spine when she initially went to the hospital after the fall. Dr. Zimmerman opined at the time of this visit, the findings were consistent with medial and lateral epicondylitis affecting the right elbow, as a consequence of the October 11, 2013, fall. He did not feel claimant was at maximum medical improvement and felt the treatment for the epicondylitis was compromised due to claimant's pregnancy. Dr. Zimmerman opined that the prevailing factor for claimant's right elbow medial and lateral epicondylitis is the October 11, 2013, accident.

Claimant delivered her baby on December 21, 2013. She was in the hospital for five days after delivery because her right hip and leg were bothering her. A neurologist was brought in to conduct nerve testing. The doctors didn't know why her hip was hurting, but she did mention the October 11, 2013, fall and indicated she thought that was probably related to her pain. Claimant reported she had the hip and leg pain before and after she received her epidural. However, the medical records from St. Francis Health Center on December 21, 2013, indicate claimant began to develop right lower extremity pain, described as a sharp shooting pain down the right thigh, after she received an epidural injection while giving birth to her child.

On December 22, 2013, claimant had a US Venous of the right lower extremity unilateral, which revealed no evidence for deep venous thrombosis in the right lower extremity venous structures. Claimant's December 23, 2013, MRI of the lumbar spine revealed a transitional vertebral body at the lumbosacral junction, designated as S1; minimal annular bulging at L4-L5 and L5-S1; no focal disc herniation, high-grade central canal or neuroforaminal stenosis; no definite evidence of epidural abscess or hematoma.

On February 25, 2014, claimant was hired at Kohl's department store. Claimant continues to have pain in her neck, pelvic bone, her ribs on the right side and her chest, sometimes when she breathes. She testified the neck pain gives her headaches.

On March 31, 2014, claimant met with Dale Garrett, M.D., for an examination. She had complaints of moderate pain in the right arm, right side of abdomen to the lower back, and neck, along with numbness and tingling in her right leg, right hip, and the top of her right foot, and of low back pain and rib pain when she breathes. She described the pain as sharp and throbbing. Dr. Garrett examined claimant and diagnosed low back pain, right sciatica after SVD; neck pain, after MVA; chronic laxity right shoulder after MVA and pelvic instability since childhood, increased post SVD. Interestingly, the examination of claimant's right elbow noted a normal range of motion, negative elbow flexion and no pain. Likewise, claimant's right wrist displayed a negative Tinel's sign, a negative Phalen's test and the

range of motion was also normal. Dr. Garrett opined claimant's problems are not related to her work activities and she should follow up with her private medical provider.

**PRINCIPLES OF LAW AND ANALYSIS**

Not every alleged error in law or fact is reviewable from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing orders is generally limited to issues where it is alleged the administrative law judge exceeded his or her jurisdiction<sup>2</sup> and the following issues which are deemed jurisdictional:

1. Did the worker suffer an accident, repetitive trauma or resulting injury?
2. Did the injury arise out of and in the course of the worker's employment?
3. Did the worker provide timely notice of the accident, repetitive trauma or resulting injury?
4. Is there any defense that goes to the compensability of the claim?<sup>3</sup>

Respondent contends the Board does not have jurisdiction over this matter, citing K.S.A. 2013 Supp. 44-534a. The ALJ, in the Order, initially found claimant has failed to sustain her burden of proof of personal injury. This is one of the issues listed in the statute granting the Board jurisdiction on an appeal from a preliminary hearing order. The Board does have jurisdiction over this issue.

K.S.A. 2013 Supp. 44-501b(a)(b)(c) states:

- (a) It is the intent of the legislature that the workers compensation act shall be liberally construed only for the purpose of bringing employers and employees within the provisions of the act. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.
- (b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.
- (c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

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<sup>2</sup> K.S.A. 2013 Supp. 44-551(l)(2)(A).

<sup>3</sup> See K.S.A. 2013 Supp. 534a(a)(2).

Claimant's testimony regarding the slip and fall on October 11, 2013, is uncontradicted. It is uncontradicted that claimant suffered the slip and fall and immediately suffered pain in her right upper extremity. Respondent does not dispute the fall occurred or that claimant proceeded to the hospital immediately after. This Board Member finds claimant suffered personal injury as the result of an accident which arose out of and in the course of her employment. The dispute herein centers around the area or areas injured, the extent and duration of those injuries and whether claimant's current need for medical treatment stems from that slip and fall and those resulting injuries.

K.S.A. 2013 Supp. 44-508(d) states:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

K.S.A. 2013 Supp. 44-508(f)(1)(2) states:

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

K.S.A. 2013 Supp. 44-508(f)(2)(B) states:

(B) An injury by accident shall be deemed to arise out of employment only if:

- (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
- (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

K.S.A. 2013 Supp. 44-508(g) states:

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

Claimant's request at the preliminary hearing stemmed around the reported need for medical treatment for her right upper extremity. The complaints presented to Dr. Zimmerman on October 13, 2013, regarded her right upper extremity. The medical notes of Dr. Zimmerman failed to document any other complaints for any other body part, contradicting claimant's allegations of multiple body parts involved.

The complaints documented by Dr. Garrett involved multiple body parts, excluding the right upper extremity. Both claimant's right elbow and right wrist tested normal, with no indications of any need for medical treatment. As noted above, the request for medical treatment at the preliminary hearing involved the right elbow only. This Board Member finds, if claimant suffered an injury to her right elbow, it was, at most, temporary. The medical evidence in this record does not support a need for medical treatment for claimant's right elbow at the time of the preliminary hearing. The ruling by the ALJ that the evidence does not support medical treatment for an injury occurring as the result of the October 11, 2013, fall, is supported by the evidence and is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>4</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

### **CONCLUSIONS**

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed. Claimant has failed to satisfy her burden of proof under K.S.A. 2013 Supp. 44-508, that her requested medical treatment is related to the fall on October 11, 2013, while claimant was at work.

### **DECISION**

**WHEREFORE**, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Rebecca Sanders dated April 2, 2014, is affirmed.

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<sup>4</sup> K.S.A. 2013 Supp. 44-534a.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of May, 2014.

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HONORABLE GARY M. KORTE  
BOARD MEMBER

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